

To Your Honor Judge Thomas Varlan

This is for Judge Thomas Varlan concerning  
the Motion of Compassionate Release in the case  
USA v. Bolze, 3:09-cr-00093, please see that he  
receives it, thank you much.

# NEWSLETTER TO FEDERAL PRISONERS

This is a copy of the newsletter sent on April 20th to our 8,000 subscribers in the federal prison system.



## **BOP Director Says, "We're Doing Pretty Good" Fighting COVID-19, But Reports Call Results "Tragic" – LISA Newsletter for April 20, 2020**

LISA publishes a free newsletter sent every Monday to inmate subscribers in the Federal system.

Edited by Thomas L. Root, M.A., J.D.

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### **BOP COVID-19 Curve Not Flattening**

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## BOP COVID-19 CURVE NOT FLATTENING

The Federal Bureau of Prisons is now in "Phase 6" of its plan to curb the spread of COVID-19 among its 172,000 inmates housed in 122 institutions and among its 30,000 staff members. As Forbes magazine put it last Wednesday, "BOP's efforts thus far have included halting social and legal visits since the middle of March, screening of inmates, staff and contractors by taking their temperature to measure infection, mobilizing administrative staff to step into front line positions, increase rate of hiring new corrections officers and halting staff training. The results have been tragic."

As of Apr 19, there are 495 inmates (up 41% from last week) and 305 staff (up 61% from last week) ill with COVID-19 in 45 institutions (more than one-third of all BOP facilities). At least 22 inmates have died, the latest at FCI Terminal Island yesterday. Reportedly, a BOP case manager from USP Atlanta died last week in her home of COVID-19.

The federal government's COVID-19 strategy has been to "flatten the curve," to spread out the spike in coronavirus cases so as not to overwhelm hospital capacity and resources. But, as Forbes notes, no epidemiologists "ever envisioned the systemic failure that would expose 177,000 inmates housed in multiple institutional clusters, some numbering over 5,000 inmates, to a COVID-19 outbreak. These failures are resulting from a lack of a widespread testing protocol at institutions, the continued transfer of inmates between institutions, the introduction of new inmates who are either arrested or self-surrender and the thousands of staff and contractors that go in and out of these institutions."

The problem that has led to the continuing skyrocketing BOP COVID-19 cases is simple: the BOP has been unable or unwilling to test any inmates "except those who have died or are willing to risk fellow inmate retribution by revealing themselves to be symptomatic. Forbes reports that "more inmates are sick than the BOP is reporting and more inmates are not reporting that they are sick out of fear of being identified as sick."

This is probably so. As of Sunday night, FCI Elkton reports 50 inmates sick with COVID-19. But last Friday, the BOP admitted in federal court that it had 207 suspected inmate COVID-19 cases, but only had ever received 80 test kits. It has used 37, leaving only 43 on hand. It expects to receive an additional 25 kits a week for the next several weeks.

USP Lompoc officials while he had a hacking cough and was so ill "he could hardly hold his head up." Efrem refused to go to the hospital that night, but the next morning his family insisted. Doctors diagnosed him with COVID-19 and put him in quarantine. No visitors were allowed. Four days later, Efrem died.

His sisters are furious, the Independent reported. "Why did they release him so sick?" one asked. "They sent him home on his deathbed."

A USP Lompoc spokesman said, "All inmates, prior to releasing from the BOP, will be screened by medical staff for COVID-19 symptoms. If symptomatic for COVID-19, the institution will notify the local health authorities in the location where the inmate is releasing, and transportation that will minimize exposure will be used, and inmates will be supplied a mask to wear."

"We're dealing with [COVID] just as well as anybody else," BOP Director Michael Carvajal told CNN a week ago, "and I'd be proud to say we're doing pretty good."

Forbes, *Federal Bureau of Prisons Institutions Not Showing Any Signs of "Flattening Curve"* (Apr 15)

Business Insider, *The Federal Bureau of Prisons has confirmed the first staff death linked to the coronavirus, report says* (Apr 18)

Wilson v Williams, Case No. 4:20cv794 (ND Ohio), Supplement to Respondents' Answer, Dkt 19, filed Apr. 18, 2020

New York Law Journal, *Brooklyn Federal Lockup Officials Describe 'Shortage of Tests' in Newly Filed Documents* (Apr 15)

CNN, *Exclusive: 'I don't think anybody was ready for this Covid,' says head of federal prisons* (Apr 10)

Northwest Arkansas Democrat-Gazette, *Emails detail talks on illnesses at federal prison* (Apr 15)

Mother Jones, *Want to Know How Fast Coronavirus Can Spread in Prison? Look at Arkansas* (Apr 15)

Santa Barbara Independent, *Sisters Say Brother Sick with COVID-19 was Released from Lompoc Prison to Die* (Apr 15)

The Northwest Arkansas Democrat Gazette released emails last Monday in which Arkansas health officials discussed whether the BOP fully understood the “seriousness” of the coronavirus outbreak at the FCI Forrest City, and whether they were fully cooperating with the mitigation effort. The released emails show that shortly after the first positive COVID-19 case at the FCI was disclosed on Friday, April 3, the Arkansas Department of Health director for infectious diseases questioned the prison’s efforts and expressed a desire for CDC backup.

The BOP has almost no ability to test. “We have very, very limited amounts of the testing kits,” Brandy Moore, secretary treasurer of the national union that represents correctional officers in federal prisons, was quoted as saying by Mother Jones magazine.

At FCC Terre Haute, “we have between 2,500 and 3,000 inmates, and we were given four tests,” Steve Markle, another leader of the national union who works at the prison, told Mother Jones in late March. At FCI Oakdale, correctional officers were told to stop testing people and just assume that anyone with symptoms had been infected, according to Ronald Morris, president of the local union there.

All of this, Mother Jones reported, “is to say that statistics reported by the Federal Bureau of Prisons are likely massive undercounts. “Our numbers are not going to be adequate because we’re not truly testing them,” Moore said.

Meanwhile, in a filing in the EDNY last Monday, the BOP admitted that “because of the shortage of tests, testing is currently reserved for those meeting’ certain criteria, including the kind of symptoms the inmate is facing, his potential exposure, whether he is high risk and whether he works in a high-contact role such as food service.” Through Thursday, April 16, the number of inmates tested at MCC New York and MDC Brooklyn has risen from 11 to 19. That is out of a combined population of over 2,300 inmates.

The ACLU has brought lawsuits against FCI Oakdale, FMC Devens, and FCI Elkton, seeking to compel release of more inmates because of the virus. “Devens — one of only seven federal prison medical centers — is a powder keg of potential infection and death from COVID-19, to an even greater degree than nursing homes, cruise ships, and other prisons, sites of some of the most intense clusters of mortality in Massachusetts, the United States, and elsewhere in the world,” the plaintiffs’ lawyers wrote in the Devens complaint.

Perhaps the most sobering report last week came from the Santa Barbara Independent, which reported that Efrem Stutson was released on April 1st and put on a bus to San Bernardino by

have gone to home confinement.

**WRAL-TV, Raleigh, NC, Former inmate says Butner officials 'slow-rolling' prisoner releases during pandemic (Apr 14)**

**WCTI-TV, New Bern, NC, Ex-Trump lawyer Michael Cohen to serve out prison sentence at home (Apr 17)**

**Houston Chronicle, 'Crammed in' and terminally ill: Prison officials drag their feet as vulnerable inmates seek release (Apr 17)**

**Livas v Myers, Case No. 20cv422 (WDLa), Declaration of Juan Segovia, filed Apr 16, 2020, Dkt**

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## **FORMER JUDGES URGE 3RD CIRCUIT TO BACK OFF RAIA DECISION**

Two weeks ago, the 3rd Circuit denied a compassionate release motion it clearly lacked the power to grant, but then went on to decide an issue that no one had raised, holding that the defendant had to exhaust remedies with the BOP first.

The defendant has petitioned for rehearing, and five former federal judges from 3rd Circuit courts have filed in support. In their brief, the judges argued that a court of appeals should not "issue a precedential opinion on a far-reaching and debatable issue of first impression, affecting numerous non-party individuals in a wide range of circumstances – some of which are literally matters of life-or-death – that had not been addressed by the district court and was not briefed in the court of appeals by the parties." They contend that the Raia panel "effectively decided a question that has divided courts across the country without acknowledging those authorities holding that the exhaustion requirement is subject to exceptions in the very circumstances presented here and without affording the parties the opportunity to argue why exhaustion should not be required under the FSA."

They ask the Court to withdraw the exhaustion holding in the opinion, a holding already bedeviling compassionate relief filers across the country.



## INTERNAL MEMO TOUGHENS CARES ACT HOME CONFINEMENT STANDARDS

A recently-released prisoner complained to a TV station that FCI Butner was "slow-rolling" COVID-19 releases. A 76-year old federal prisoner told the Wall Street Journal that so far has been unable to convince officials to release him despite his age and history of respiratory problems. "It's like pushing a wet noodle up the hill with your nose," he said. An attorney representing the FCI Oakdale plaintiffs complained last Monday that only three prisoners have been given CARES Act releases. The Houston Chronicle said last Thursday that "as the coronavirus crisis raises concerns about mass infections at prisons and jails, few federal prisoners from south-east Texas have cleared the gauntlet for compassionate early release."

The BOP, on the other hand, says it has already sent more than 1,119 to home confinement as of last Wednesday. Most recently, the entire population of FCI Otisville camp (111 inmates) was sent to quarantine in preparation for release to home confinement.

But last Wednesday, the BOP issued internal guidance that restricts those who can go to home confinement well beyond what Attorney General Barr directed. In an affidavit filed in WD Louisiana, an FCI Oakdale Associate Warden reported that "on April 15, 2020 we received a memorandum from BOP's Correctional Programs Division, confirming the factors to be used when reviewing and referring inmates for home confinement... 1) Primary or prior offense is not violent; 2) Primary or prior offense is not a sex offense; 3) Primary or prior offense is not terrorism; 4) No detainer; 5) Mental Health Care Level is less than IV; 6) PATTERN... score is Minimum; 7) No Incident Reports in the past 12 months; 8) US Citizen; and 9) have a viable release plan."

The BOP criteria are more restrictive than what Barr specified in his Mar 26 and Apr 3 memos. Barr made violence, sex or terrorism disqualifying only if it was the offense of conviction, the crime for which the inmate is now serving time. Plus, Barr did not outright disqualify for an incident report in the past year, or a PATTERN score above minimum. Rather, his memo merely said that such factors "would not [be] receiving priority treatment," implying that they would be weighed against other factors.

The changes make home confinement for anyone other than a camper problematical. At FCI Elkton, only six inmates have been approved for home confinement, while 32 have been denied. At Oakdale, of 68 elderly inmates, 75% are ineligible. Only six of the remaining inmates

US v Raia, 3rd Cir Case No. 20-1033, Brief of Amici Curiae Former Members of the Judiciary in  
Support of... Rehearing (filed Apr 14, 2020)



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For privacy, we normally omit inmates' real names from our reports if they are still locked up.

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